Supreme Court, U.S.
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NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ALBERT W. WITTER, and
wife, PHYLLIS WITTER,
*Petitioners,*

*v.*

ULYSES NESBIT,
*Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE TENNESSEE SUPREME COURT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether for Equal Protection analysis, Tennessee's goal, in Tenn. Code Ann. § 56-7-106(a), of protecting uninsured motorists' carriers at the expense of insured motorists is a legitimate state objective?

2. Whether for Equal Protection analysis, Tennessee's granting of an exemption status, to uninsured motorist from default judgments unconstitutionally grants privileges and immunities to uninsured motorist.

3. Whether the deprivation of a default judgment without notice or hearing is in violation of Due Process?

## LIST OF PARTIES

The petitioners are Albert W. Witter and his wife Phyllis Witter.

The respondents are Ulyses Nesbit; and Nationwide Mutual Insurance Company, uninsured motorist carrier of petitioner, Albert W. Witter.

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## OPINIONS BELOW

The Circuit Court for the Western District of Tennessee filed its unpublished Memorandum Opinion - Order On Jury Verdict - on June 15, 1992, is reprinted in Appendix A.

The opinion of the Court of Appeals of Tennessee, Western Division at Jackson, filed December 15, 1993, not yet reported, is reprinted in Appendix B.

The Tennessee's Supreme Court's denial for application to appeal, filed April 4, 1994, is reprinted in Appendix C.

## STATEMENT OF JURISDICTION

The denial of permission to appeal by the Tennessee Supreme Court was entered on April 4, 1994 and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides that: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const., Amend. XIV, §1.

2. Section 1206 of the of the Tennessee Insurance Law, Tenn. Code Ann. § 56-7-1206 (1989) (emphasis added), provides as follows;

> **56-7-1206. Service of process - Actions by insurers - John Doe warrants - Arbitration.** - (a) Any insured intending to rely on the coverage required by this part shall, if any action is instituted against the owner and operator of an uninsured motor vehicle, serve a copy of the process upon the insurance

company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant. Such company shall thereafter have the right to file pleadings and take other action allowable by the law in the name of the owner and operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice; provided further, that the evidence of service upon the insurance carrier shall not be made a part of the record.

(b) If the owner or operator of any motor vehicle which causes bodily injury or property damage to a person insured under this part is unknown and if such insured satisfies all of the requirements of § 56-7-1206(e), should suit be instituted the insured shall issue a John Doe warrant against the unknown owner or operator in order to come within the coverage of his uninsured motorist policy. If the uninsured motorist's identity and whereabouts is discovered during the pendency of the proceeding, the provisions of subsection (e) shall govern the proper course of action following such discovery.

(c) The uninsured motorist

provision shall not require arbitration of any claim arising thereunder nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

(d) in the event that service of process against the uninsured motorist, which was issued to his last known address, is returned by the sheriff or other process server marked, "Not to be found in my county," or words to that effect; or if service of process is being made upon the secretary of state for a non-resident uninsured motorist and the registered notice to the last known address is returned without service on the uninsured motorist, the service of process against the uninsured motorist carrier, pursuant to this section, shall be sufficient for the court to require the insurer to proceed as if it is *the only defendant* in such case.

(e) In the event the uninsured motorist's whereabouts is discovered during the pendency of the proceedings, an alias process may issue against the uninsured motorist. in such a case, the uninsured motorist shall be allowed a reasonable time within which to plead to the original process and then the case may proceed against uninsured motorist as if he were served with process in the first

instance.

## STATEMENT OF THE CASE

This action challenges the constitutionality of the Tennessee Insurance Law, Tenn Code Ann. § 56-7-1206(a) (1989). The Tennessee Court of Appeal's interpretation of T.C.A. § 56-7-1206 permitted the respondent, a *known* and properly served uninsured motorist, to elude the ramifications of failing to answer a complaint. Furthermore, § 56-7-1206 places certain procedural obstacles in the path of the insured motorist, seeking compensation, that no1xther class plaintiffs must endure.

On June 6th, 1989, Petitioner, Albert W. Witter, was injured when respondent, Ulyses Nesbit, an uninsured motorist, attempted to make an improper left hand turn in front of petitioner whereby petitioner struck the vehicle driven by respondent. Pursuant to Tenn. Code Ann § 56-7-1206 (1989), Petitioner served process on both the Respondent and the Petitioner's uninsured motorist carrier, Nationwide Mutual Insurance Company

(Nationwide). On December 5, 1989, Nationwide filed an answer generally denying the allegations in Petitioner's complaint. Although served with process, the Respondent failed to file an answer to the complaint.

On September 21, 1989, Petitioner motioned the court for a default judgment against Respondent. The motion for default judgment was subsequently heard on February 25, 1991 in the presence of and without opposition from Nationwide's counsel. On March 20th, the default judgment against Respondent was entered and signed by Nationwide's counsel. Furthermore, the trial court's judgment provided "[T]hat a writ on inquiry as to damages against [Respondent] shall be set at the time of the trial." This writ of inquiry has never been held.

Petitioner, in response to the default judgment, moved for summary judgment against Nationwide. The trial court denied Petitioner's motion and Nationwide was permitted to relitigate the case on

Respondent's behalf before a jury.

After three weeks of trial, the jury returned a verdict in response to special interrogatories and judgment was entered. The jury determined Respondent to be negligent in the operation of his vehicle. However, the jury also determined that Petitioner was responsible for more than fifty percent of the negligence that resulted in his injuries, not the cause of the accident. Caveat, this is the first case this court decided after the adoption of comparative negligence.

The unconstitutional violation of the equal protection clause emerged in the opinion of The Tennessee Court of Appeals when the court of appeals permitted the Respondent to obviate himself from the default judgment thereby forcing the Petitioner to relitigate his case against Respondent. In Petitioner's application for permission to appeal, the court of appeals determination, to the Tennessee Supreme Court, Petitioner contended that, "[f]or the Court of Appeals to rule that

T.R.C.P. 55.01 [default judgment] does not apply to a defendant when pleadings are filed by an insurance company in its own name pursuant to T.C.A. §56-7-1206(a) defeats substantial justice . . . [and] this matter cries out for an adjudication on the constitutional issue now raised . . ." (p. 1, Appellant's Brief). Petitioner further stated, "[t]he Court of Appeals has created a classification of individuals (uninsured motorists) to whom are granted rights, privileges, immunities and exemptions which are not extended to other citizens . . ." (p. 1, Appellant's Brief).

The Tennessee Supreme Court denied Petitioner's permission for application to appeal.

## REASONS FOR GRANTING THE WRIT

The central issues in this case -- forcing an injured motorist to litigate against duplicate defendants and affording the uninsured negligent motorist greater protections than insured motorist -- are ones of first impression for the Court, and of substantial public importance.

A. Insurance statutes in violation of the equal protection clause of the Fourteenth Amendment by arbitrarily favoring one class of citizens is a substantial issue, which has not been, but should be, addressed by the Court.

Insurance regulation touches some aspect of nearly every citizen of the United States. Furthermore, insurance contracts are contracts of adhesion which places the policy purchasers at the mercy of the insurance institution. By permitting a state statute to capriciously and arbitrarily discriminate against insurance policy holders places that class of citizens not only at the mercy of the insurance institutions, but also at the mercy of state legislatures. The allowance of such inequities leads to an extreme travesty of

justice affecting the public at large. Therefore, a statute capriciously favoring uninsured motorists and insurance institutions at the expense of their policy holders neither serves justice nor a legitimate state objective.

While Tennessee has an interest in protecting insurance companies from frivolous lawsuits and unknown defendants, Tennessee has no legitimate interest of accomplishing this goal in an ineffective manner which harms the insurance policy holder. According to § 56-7-1206(d) an inference is made that if the uninsured motorist's identity is known, the plaintiff faces two separate defendants.[1] In the instant case, Petitioner, after obtaining a default judgment against Respondent, was forced to relitigate the precise issues against his own uninsured motorist carrier.

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[1] Tenn Code Ann. § 56-7-1206(d) provides in pertinent part: ". . shall be sufficient for the court to require the insurer to proceed as if it is the only defendant in such case."

In an effort to rationalize this application of § 56-7-1206 the court of appeals in Witter v. Nesbit stated:

> It seems clear to this Court that by allowing the uninsured motorist carrier to defend the tort action on behalf of the insured or in its own name, the legislature intended to prevent a situation in which the uninsured motorist carrier would be bound by a default judgment against an uninsured motorist who may have no interest in defending the case.

However, this reasoning is logically flawed. Although a motorist's interest in defending a suit is contingent on whether or not that motorist has procured insurance, the Tennessee Court of Appeals logic is contrary to reality.

Under Tennessee statute[2], the insurance

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[2] Tenn. Code Ann. § 56-12-110(a) provides in pertinent part:

> "Any person recovering under this part shall be deemed to have assigned his rights under the policy to the association to the extent of his recovery from the association. Every insured or claimant seeking the protection of this part shall cooperate with the association to the same extent as such

company is subrogated to the rights of its insured for the amount of damages occasioned by the uninsured motorist's negligence. If the insurance company pays a claim to its insured under the policy, it may attempt to recover that amount from the uninsured motorist.[3] Due to the fact that the uninsured motorist has failed to procure insurance, the uninsured motorist must reimburse the insurance company out of his or her own pocket. Consequently, an uninsured motorist's interest in rigorously defending the case is greater than that of an insured motorist, for the uninsured motorist risks being out of pocket any damages precipitated by his

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> person would have been required to cooperate with the insolvent insurer."

[3] Note, a serious ethical problem may arise under these circumstances. In an instance where the company has directly defended the uninsured motorist in a suit instituted by the insured, and then purposes its subrogation claim, it would be seeking a judgment against its former client.

negligence.

Furthermore, if a motorist is deemed guilty, whether by default judgment or adjudication by a court, the motorist will still be liable to the insurance company through the rights of subrogation. Therefore, for the Tennessee legislature to draw such distinctions based on whether or not a motorist is uninsured due to the interest of the motorist in defending his suit is both logically and fundamentally flawed.

The constitutional violation emerges, however, when § 56-7-1206 forces an insured driver, injured by an uninsured motorist, to litigate against duplicate defendants. Recognizing this, the appellate court, in Witter v. Nesbit, stipulated that allowing the uninsured motorist carrier to continue defending the same action to which a default judgment had been rendered would produce an "incongruous result." However, the appellate court defied its own logical reasoning by compelling Petitioner to relitigate against a

second defendant. It is important to note, that no other class of injured drivers, except those coming within the framework of § 56-7-1206, is forced to litigate with duplicate defendants the same cause of action.

To withstand equal protection review, actions that distinguish between similarly situated classes must be rationally related to a legitimate governmental purpose. In Zobel v. Williams, 457 U.S. 55 (1982), the Court examined Alaska's proffered objective in justifying the unequal distribution of state benefits. In Zobel the Court held that creating a financial incentive for individuals to establish and maintain residence in Alaska served no valid interests rationally served by the distinctions the state made between lengths of residency. The Court reasoned, in part, that the statute had the unintended effect of generating dissatisfaction among newcomers rather than providing them with an incentive to stay.

Here the statute has the unintended

effect of generating less incentive for uninsured motorists to procure insurance. An uninsured motorist who injures an insured motorist may sit idly by and take a default judgment knowing that default judgment may be removed when the insurance company steps in to relitigate the case. So in a sense, the uninsured motorist is afforded the opportunity to have free counsel from those experienced in the field of insurance litigation by standing idly by and taking a default judgment.

The second and most vivid form of discrimination in violation of Equal Protection is the capricious granting of uninsured drivers immunities from default judgments. Other than those uninsured motorist falling within the purview of § 56-7-1206, no other class of drivers or United States citizens are able to be cleansed of a default judgment. Without exception, this class of uninsured motorist is granted immunities enjoyed by no other class (other than the U.S. Government). Furthermore, these

immunities come at the detriment of those responsible insured drivers who are injured by the uninsured motorist.

In the case now before this Court, the Tennessee Court of Appeals and the Tennessee Supreme Court have concluded that it is constitutionally permissible to confer both an economic benefit and an immunity from default judgments to that class of drivers who operate motor vehicles without procuring insurance. This leads to the startling conclusion that it would be unconstitutional to arbitrarily provide uninsured motorist the cost associated with defending their suit while constitutional to allow them to take a default judgment and then, if the insurance company is victorious on the merits, to have both the benefit of free counsel and immunity from that default judgment.

The problems thus examined can be exemplified through the use of the following hypothetical. Driver A believes he is more contentious than the average driver and

chooses to self-insure. Now A, an uninsured motorist, runs a red light striking two other cars driven by B and C. B has full insurance coverage, C doesn't. Both B and C serve A. Knowing that he is responsible for the accident, A chooses not to answer. B and C take default judgments against A.

In this hypothetical, both B and C are similarly situated drivers with the exception that B has the added protection of uninsured motorist coverage. However, according to § 56-7-1206 an interesting result occurs. B's insurance company steps in, and relitigates the case for A, since under the ruling in Witter, B cannot take a default judgment against A.

Driver C, the uninsured motorist, now has greater rights than B the insured motorist and is able to recover his damages. Through the added protection of insurance, B, unlike C, was forced to relitigate his case against A. Thus, it is legally better to be uninsured.

Is B's default judgment against A simply

retrospectively removed or does B still have a right to proceed against A who has previously admitted guilt. If B does still retain the right to proceed against A, does application of § 56-7-1206 simply allow the insurance company to avoid having to pay the claim, they are contractually bound to pay. Or is B simply precluded from recovering from both the insurance company and A while C, the uninsured motorist injured in precisely the same incident is still *permitted* to recover from A. Such application of § 56-7-1206 acts as a blatant disincentive to motorist in the procuring of uninsured motorist coverage and results in unequal protection under the laws for both B and C.

B. 56-7-1206 is a product of insurance lobbying designed to protect the insurance institutions no matter what the cost is to the public.

Uninsured motorist coverage was initially designed to provide the injured insured motorist the precise protection whether injured by an insured or uninsured motorist.

However, as the result of intense lobbying, uninsured motorist coverage is a product of super-legislation pregnant with problems.

According to § 56-7-1206, if the uninsured motorist counterclaims, the insured motorist must now pursue his cause of action in a trial tainted by a conflict of interest. In defending its own insured against an uninsured motorist's cross-action, the insurance company will attempt to either establish that its insured was not negligent or that the uninsured motorist was also negligent. Either of these contentions are opposed to the position[4] that the insurance company takes as an intervening party defendant in the original action by the insured against the uninsured motorist. In such a dual representation, it would inure to

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[4] If the insured brings suit against the uninsured motorist and the company is permitted to defend such uninsured motorist, the company would attempt to prove either the negligence of its own insured, or the uninsured motorist's freedom from negligence.

the benefit of the insurance company to have the court determine that both the insured motorist and the uninsured motorist were equally at fault.

Therefore, § 56-7-1206 unconstitutionally forces that class of insured drivers injured by an uninsured motorist, who files a cross-action, to pursue his claim in a trial tainted by a conflict of interest. Other than a plaintiff coming within the purview of § 56-7-1206, no other class of citizens is forced to utilize the services of counsel having an interest contrary to theirs.

Therefore, the state's only legitimate objective of protecting insurance companies from disinterested (uninsured motorists) would come in the form of protecting insurance companies in the situation where the identity of the uninsured motorist is *unknown*.[5] In this situation the problems of: (1) duplicate

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[5] Tenn. Code Ann. § 56-7-1206 provides for service on a John Doe when the uninsured motorist is not found.

defendants, (2) immunities from default judgments, (3) interests in rigorously defending the suit, and (4) the conflict of interest in the cross-action context, are all obviated.

Uninsured motorist coverage was not meant to place additional unconstitutional burdens on insured drivers but to protect them from the irresponsibility of others. Tennessee's Insurance Laws, however, inure only to the benefit of insurance companies, in the uninsured motorist context, by placing unconstitutional burdens on those the laws were enacted to protect. Without further review from this court, this severe travesty of justice, affecting nearly every citizen will be allowed to perpetuate. Furthermore, forcing plaintiffs to litigate their causes of action in courts tainted by a conflict of interest denies plaintiffs the opportunity to have their cases heard at a fair and objective trial. This deprivation of the right to adjudicate in a fair and objective trial is a

violation of due process.

C. The validity of a statute denying one an interest in a property right without due process of law, is a substantial issue, which should be addressed by the Court.

The type of interest protected, under due process analysis, "as property are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact.'" National Mutual Insurance Co. v. Tidewater Transfer Co., 357 U.S. 582, 646 (1949). Therefore, a default judgment is a property interest subject to procedural due process safeguards requiring that some form of hearing be held before one can be deprived of their interest in a default judgment.

Tenn. Code Ann. § 56-7-1206 forces plaintiffs to litigate against two separate defendants when the identity of the uninsured motorist is known and the uninsured motorist carrier does not represent the uninsured motorist. In a tort action, if a plaintiff litigates against two separate defendants, the first defendant is not bound by the judgment

rendered on the second defendant. However, according to the court of appeals and § 56-7-1206, the first defendant, here the respondent, can be cleansed of a default judgment by the court's exoneration of the second defendant. This is a constitutional violation of due process in that without proper notice and a hearing, no state may deprive one of the benefits of a default judgment.

Petitioner obtained a default judgment against respondent, which, for purposes of adjudication, is an admission to both liability and the amount of damages asserted. Then due to a procedural quirk in § 56-7-1206, petitioner's default judgment was rendered a mere mistake by the court of appeals. However, the trial court made no mistake in entering the default judgment, for the respondent failed to answer.

Now, to deprive petitioner of his default judgment, the state must provide petitioner with a hearing to determine the default

judgment's validity. However, no hearing was ever held to determine the validity of respondent's failure to plead. Nor was petitioner given a chance to confront respondent on the issue of the default judgment. In reality, petitioner was only forced to relitigate, the issues respondent conceded, against an intervening party having nothing to do with the validity of the default judgment.

"Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Parham v. Cortese, 407 U.S. 67, 80 (1972). Therefore, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

Here, Petitioner was deprived of his

property interest in the default judgment without ever receiving actual notice that such property interest was at issue. To provide petitioner with the type of notice required by due process, petitioner should have been informed that his default judgment was subject to being taken away. Then and only then, could the petitioner have had a fair and informed hearing concerning the validity of the default judgment. Here, at the second trial, neither the petitioner nor the respondent ever contested the validity of the default judgment. However, somewhere in the middle of the court of appeal's reasoning and Tenn. Code Ann., § 56-7-1206 the default judgment just vanished as if it never existed.

To circumvent the realm of problems presented by the uninsured motorist statute of Tennessee, the statute should only be applied to a situation where the uninsured motorist is unknown. That is what the legislature originally intended and that is the only just and equitable application of § 56-7-1206. The

statute, as it reads and is interpreted now, presents serious problems in and out of the borders of Tennessee and must be addressed.

**CONCLUSION**

For these reasons, the Court should grant this petition for certiorari and, upon review, the judgment of the judgment of the Tennessee Court of Appeals should be reversed in relevant part.

Respectively submitted,

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# APPENDIX

## APPENDIX

Circuit Court for the Western
District of Tennessee - Order
On Jury Verdict -on June 15, 1992 . . . A

Court of Appeals of Tennessee,
Western Division at Jackson, filed December
15, 1993 . . . . . B

Tennessee Supreme Court's denial
for application to appeal, filed
April 4, 1994 . . . . . C

# APPENDIX A

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

ALBERT W. WITTER, and
wife, PHYLLIS WITTER,

Plaintiffs,

vs.

ULYSES NESBIT,

Defendant.

ORDER ON JURY VERDICT

This cause came on to be heard upon the filing of the complaint, the filing of an answer by the uninsured motorist carrier, Nationwide Mutual Insurance Company, and upon a default judgment taken against the defendant, Ulyses Nesbit; the trial beginning May 18, 1992, and continuing through June 4, 1992, before a jury of twelve, to wit: Kathie Boyd, Kevin A. Hardin, Juan D. Hogan, Leornard B. Hampton, Edward S. Chambers, Terrel Layrock, William E. Hardwick, Micheal D. Chaffin, James Wade, Jr., Lisa Chappel, Carol J. Vandoesburg; upon the testimony of the Plaintiffs, Albert W. Witter, and wife, Phyllis Witter, their witnesses and evidence;

the defendant, Uylses Nesbit failing to appear until the second week of trial when called by the Respondent, Nationwide Insurance Company, upon the testimony of the Defendant Ulyses Nesbit; upon statements and argument of counsel for the Plaintiffs, Albert W. Witter and wife, Phyllis Witter; upon statements and arguments of counsel for the Respondent, Nationwide Insurance Company, their witnesses and evidence; the charge of the Court; and upon the entire record.

The jury, having deliberated, returned its verdict on June 4, 1992, in which the jury found the liability issues in favor of the Respondent, Nationwide Insurance Company, and against the contentions of the Plaintiffs, Albert W. Witter, and wife, Phyllis Witter.

It further appeared to the Court that judgment should be entered on the jury's verdict.

IT IS, THEREFORE, BY THE COURT, ORDERED, ADJUDGED AND DECREED that this action be dismissed with prejudice as against the Respondent, Nationwide Insurance Company; and

that there is no just reason for delay and judgment be, and is hereby directed to be entered accordingly.

The costs of this cause are adjudicated against the Plaintiff for which let execution issue.

GEORGE H. BROWN, Jr.

6-15-92

# APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

ALBERT W. WITTER and
wife, PHYLLIS WITTER,

Plaintiffs-Appellants,

vs.

Ulyses Nesbit,

Defendant-Appellee

~~From the Circuit Court of Tennessee For the~~
Thirtieth Judicial District at Memphis

The Honorable George H. Brown, Jr., Judge

Asa H. Hoke of memphis
For Appellants

E. Patrick Lancaster of Memphis
Larry M. Sargent of Memphis
For Appellee, Nationwide Mutual Insurance Company

AFFIRMED AND REMANDED

Opinion filed: DEC 15 1993

CRAWFORD, J.

CONCUR:

HIGHERS, J.

FARMER, J.

Plaintiffs, Albert W. Witter, and wife, Phyllis Witter, filed this action against defendant, Ulyses Nesbit, an uninsured

motorist, and pursuant to T.C.A. § 56-7-1206 (1988) also served process on the uninsured motorist carrier.

The Complaint alleges that Mr. Witter, while driving his employer's vehicle, was involved in a collision with a vehicle driven by defendant, and that he sustained serious and permanent personal injuries as a direct and proximate result of defendant's negligence, both under the common law and by virtue of defendant's violation of various state statutes and city ordinances.

Although served with process, the defendant, Nesbit, did not file an answer or other response to the complaint Nationwide Mutual Insurance Company, the uninsured motorist carrier, filed an answer to the complaint which, among other things, specifically responded to the allegations of the plaintiff's complaint. the answer denied the allegations of negligence and violations of statutes and ordinances on the part of the defendant, denied that Mr. Witter was injured in the nature and to the extent as alleged in

his complaint, and denied any of his losses, injuries and damages were directly and proximately caused by the negligence of the defendant. The answer also alleged that Witter was contributorily negligent based on common law negligence and violations of various state statutes and city ordinances.

Plaintiff moved for a default judgment against Nesbit, which the trial court granted without any opposition from Nationwide, although Nationwide, as indicated above, contested Nesbit's liability by joining issue on the complaint's allegation and asserting affirmative defenses. On march 20, 1991, the trial court entered an order granting the motion for default judgment; the order provided: "[T]hat a writ of inquiry as to damages against Ulyses Nesbit shall be set st the time of the trial in this matter."

Subsequently, plaintiff filed a motion for summary judgment against Nationwide grounded in part on the default judgment against the uninsured motorist, which motion was denied by the trial court. After what

appears to be extensive pretrial discovery proceedings, the case was tried before a jury for approximately ten days on the issues joined by plaintiff's complaint and Nationwide's answer.

The jury returned its verdict in response to special interrogatories, and the court entered judgment thereon, which we quote:

> This cause came on to be heard upon the filing of the complaint, the filing of an answer by the uninsured motorist carrier, Nationwide Mutual Insurance Company, and upon a default judgment taken against the Defendant, Ulyses Nesbit; the trial beginning May 18, 1992, and continuing through June 4, 1992, before a jury of twelve, to wit: Kathie Boyd, Kevin A. Hardin, Juan D. Hogan, Leornard B. Hampton, Edward S. Chambers, Terrel Layrock, William E. Hardwick, Micheal D. Chaffin, James Wade, Jr., Lisa Chappel, Carol J. Vandoesburg; upon the testimony of the Plaintiffs, Albert W. Witter, and wife, Phyllis Witter, their witnesses and evidence; the defendant, Uylses Nesbit failing to appear until the second week of trial when called by the Respondent, Nationwide Insurance Company, upon the testimony of the Defendant Ulyses Nesbit; upon statements and argument of counsel for the Plaintiffs, Albert W. Witter and wife, Phyllis Witter; upon statements and arguments of counsel

> for the Respondent, Nationwide Insurance Company, their witnesses and evidence; the charge of the Court; and upon the entire record.
>
> The jury, having deliberated, returned its verdict on June 4, 1992, in which the jury found the liability issues in favor of the Respondent, Nationwide Insurance Company, and against the contentions of the Plaintiffs, Albert W. Witter, and wife, Phyllis Witter.
>
> It further appeared to the Court that judgment should be entered on the jury's verdict.
>
> IT IS, THEREFORE, BY THE COURT, ORDERED, ADJUDGED AND DECREED that this action be dismissed with prejudice as against the Respondent, Nationwide Insurance Company; and that there is no just reason for delay and judgment be, and is hereby directed to be entered accordingly.
>
> The costs of this cause are adjudicated against the Plaintiff for which let execution issue.

Plaintiff has appealed and his first issue for review as rephrased by the Court is whether the trial court erred in conducting the trial on the issues joined by the complaint and Nationwide's answer when a default judgment had previously been entered against the defendant uninsured motorist.

Plaintiff asserts that he was forced to trial and that the court refused to entertain any motion concerning the default judgment or writ of inquiry, which resulted in conflicting and inconsistent judgments. Before commenting on plaintiff's assertions, we should first consider the procedure used in this case. Mandatory uninsured motorist coverage is "for the protection of persons insured thereunder who are legally entitled to recover compensatory damages from owners or operators of uninsured motorist vehicles because of bodily injury, sickness or disease, including death, resulting therefrom." T.C.A. § 56-7-1201 (a) (Supp. 1993).

In Glover v. Tennessee Farmers Mut. Ins. Co., 225 tenn. 306, 468 S.W.2d 727 (1971), our Supreme Court said, regarding the above quoted language of the statute:

> We deem the language quoted as equivalent to requirement that the defendant insurer pay such sums as such uninsured motorist would be legally liable to pay to its insured up to the limits required by the statute.
>
> "Legal liability means, with

> respect to insurance contracts, a liability which the courts of justice will enforce as between parties litigant. Abbot v. Aetna Cas. & Surety Co., D. C. Maryland, 42 F.Supp. 793, 806; Glove & Republic Ins. Co. v. Independent Trucking Co., 387 P.2d 644, 646. Substantially to the same effect see the ruling of the Supreme Court in Arnold v. Walton, 205 Ga. 606, 611, 54 S.E.2d 424. It is fundamental that the legal liability of one person to another can be ascertained only in an action brought against such person by the other in a court of competent jurisdiction.

468 S.W.2d at 729-30.

A defendant, by suffering a default judgment to be entered against him, impliedly confesses all of the material allegations of fact contained in the complaint, except for the amount of plaintiff's unliquidated damages. Patterson v. Rockwell Intern., 665 S.W.2d 96 (Tenn. 1984). Thus, upon entry of a proper default judgment, the subsequent proceedings should be confined to the establishment of the amount of damages.

The procedure for actions against uninsured motorists is set forth in T.C.A. § 56-7-1206 (1988), which provides, as pertinent

to the issues before us:

> (a) Any insured intending to rely on the coverage required by this part shall, if any action is instituted against the owner and operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant. Such company shall thereafter have the right to file pleadings and take other action allowable by the law in the name of the owner and operator of the uninsured motor vehicle or in its own same; provided, however, that nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice; provided further, that the evidence of service upon the insurance carrier shall not be made a part of the record.

According to T.C.A. § 56-7-1206, the uninsured motorist carrier has no obligation to defend the action on behalf of the uninsured motorist, but has the right to do so. If the carrier chooses not to defend, it is bound by the judgment against the uninsured motorist. Harvey v. Birchfield, 535 S.W.2d 334 (Tenn. 1976); Glover v. Tennessee Farmers Mut. Ins. Co., 223 Tenn. 306, 468 S.W.2d 727 (1971).

It seem clear to this court by allowing the uninsured motorist carrier to defend the tort action on behalf of the insured or in its own name, the legislature intended to prevent a situation in which the uninsured motorist carrier would be bound by a default judgment against an uninsured motorist who may have no interest in defending the case. In the case at bar, Nationwide, the uninsured motorist carrier, filed an answer, specifically joined issue on the allegations of the complaint and asserted affirmative defenses. To allow entry of a default judgment against the defendant uninsured motorist that could legally entitle plaintiff to recover damages for which the uninsured motorist carrier would be liable, and at the same time allow the uninsured motorist carrier to continue defending the action would produce an incongruous result. The uninsured motorist carrier has the right to defend the tort action, and the defense must necessarily be on behalf of the uninsured motorist. Although Tenn.R.Civ.P. 55.01 provides for the entry of a default judgment

against a party who has failed to plead, this rule should not apply when pleadings are filed on behalf of a defendant pursuant to T.C.A. § 560701206(a).

T.C.A. § 56-7-1206 provides the procedure by which uninsured motorist coverage protects an insured party and also establishes a safeguard for the insurer against the whim of the uninsured motorist. Admittedly, Tenn.R.Civ.P. 55.01 provides for the entry of a default judgment in the event of failure of a defendant to plead; however, T.C.A. § 56-7-1206 allows a defense to the suit even if the defendant does not plead.

In Lady v. Kregger, 747 S.W.2d 342 (Tenn. Ct. App. 1987), the Eastern Section of this Court dealt with the interpretation of Tenn.R.Civ.P. 3 in conjunction with claims against a uninsured motorist pursuant to the provisions of T.C.A. x§ 56-7-1206. The Court, speaking through Judge Goddard, said:

T.C.A. § 1-3-103 provides:

> If provisions of different titles or chapters of the Code appear to contravene each other,

> the provision of each title or chapter shall prevail as to all matters and questions growing out of that title or chapter.
>
> The Tennessee Rules of Civil Procedure are "laws" and are subject to being superseded in the same manner as statutes. See Tennessee Department of Human Services v. Vaughn, 595 S.W.2d 62 (Tenn. 1980). Thus, the specific provisions in T.C.A. § 56-7-1206(e) prevail over the conflicting general provisions in T.R.C.P. Rule 3.

747 S.W.2d at 345.

In the case at bar, the specific provisions in T.C.A. § 56-7-1206(a) that allows the uninsured motorist carrier to contest the allegations of the complaint in the tort action prevails over the provision in Tennessee rule of Civil Procedure 55.01 that provides for the entry of a default judgment upon failure to plead by a party against whom a judgment is sought. Therefore, in the face of the pleadings filed, the trial court should not have granted the default judgment in the instant case. We note, however, that the plaintiff filed the motion for a default judgment and Nationwide did not contest the

granting of same.

Subsequent to the granting of the default judgment, plaintiff moved for summary judgment against Nationwide grounded in part on the entry of default judgment against the uninsured motorist. The trial court denied this motion, and from a review of the record before us, it appears that the default judgment was ignored in further trial proceedings.

Plaintiff argues that he was forced to go to trial and that the court refused to entertain any motions concerning the default judgment or writ of inquiry. In making these allegations, plaintiff includes no references to the record, and we find nothing in the record to indicate that there was any objection to proceeding to trial or any attempt to limit the scope of defendant's proof to damages only. To the contrary, the record indicates that plaintiff, under questioning from his counsel, testified fully and competently concerning the facts of the accident to establish the liability of the

defendant uninsured motorist. In this same vein, the record does reflect that at the conclusion of plaintiff's case, defense counsel advised the court that he had two witnesses in the hall and that one of the witnesses was the defendant, Ulyses Nesbit. The following proceedings occurred:

> THE COURT: The defendant? You got any objection?
>
> MR. HOKE: Yes, I do, Your Honor.
>
> THE COURT: What?
>
> MR. HOKE: Basically he's a defendant in this case. there has already been a default judgment taken against him. he has not appeared at this trial as a defendant. Basically I've stated that before. I still have that objection.
>
> THE COURT: Well, I mean, his real client has a right to defend himself.
>
> MR. HOKE: And I think that under the circumstances his failure to appear, his failure to cooperate in the discovery in this case, or defend himself in a default judgment being issued against him that he should be precluded from testifying at this point in time. I --
>
> THE COURT: Off the record. (Off-the-record discussion)
>
> THE COURT: I think I'm going to let him testify.

The record does not include the jury voir dire, opening or closing arguments of counsel, so we are unable to ascertain how Nationwide's counsel was identified to the jury. the record does reflect, however, that the trial court instructed the jury specifically regarding the responsive pleadings of the defendant. As a result, it appears that both the parties and the trial court completely disregarded the default judgment. From our review of the record, we cannot find that the erroneous entry of the default judgment had any effect on the trial of the case; moreover, plaintiff's counsel was well aware of Nationwide's answer contesting liability, but took no steps prior to trial to clarify any question concerning the trial procedure. the error in granting the default judgment was harmless; therefore, plaintiff's first issue is without merit.

Plaintiff's second issue is whether the trial court erred in denying plaintiff's motion to disqualify defense counsel.

Plaintiff asserts that defendant's

counsel has a conflict of interest because the same counsel represented Nationwide in defense of Witter's workers compensation claim against his employer. nationwide provided both workers compensation and automobile liability insurance coverage to Witter's employer. Plaintiff argues that because the workers compensation carrier has a right of subrogation for the compensation paid, the defense counsel should in effect be assisting plaintiff in recovery. this argument is without merit. Although the worker's compensation carrier has a right of subrogation, in the instant case the workers compensation carrier and uninsured motorist carrier are the same company, and the policy provides for a credit for amounts paid under the workers compensation statute. An order was duly entered in the trial court noting such a credit toward any future recovery. Moreover, plaintiff's counsel has failed to show that there is any conflict of interest on the part of defense counsel and has cited no authority in support of his position. The

issue is without merit.

Plaintiff's next issue, as stated in his brief, is:

> III. The jury's verdict was contrary to the weight of the evidence and the court as 13th juror erred by failing to grant a new trial as the jury was motivated by passion, prejudice or some other unknown bias and no the weight of the evidence or jury instruction.

In this case, only the plaintiff and the defendant testified concerning the facts of the accident. The Court of Appeals does not reweigh the evidence or reevaluate the witnesses' credibility in an appeal from a jury verdict. Grissom v. Metropolitan Govt. of Nashville, 817 S.W.2d 679 (Tenn. 1991). This Court on appeal is required to take the strongest legitimate view of the evidence favoring the prevailing party, discard all contrary evidence, allow for reasonable inferences to uphold the jury's verdict and et aside the jury verdict only when there is no material evidence to support it. T.R.A.P. 13(d). Smith County v. Eatherly, 820 S.W. 2d 366 (Tenn. Ct. App. 1991), cert. denied, 112

S. Ct. 1762, 118 L.Ed2d 424; Glover v. Oakwood Terrace Associated II, 816 S.W.2d 43 (Tenn. Ct. App. 1991).

Plaintiff's assertion that we should reweigh the evidence is without merit. On this issue, plaintiff also apparently argues that the trial judge should have set the jury verdict aside. When a party asserts in a motion for a new trial that the verdict is contrary to the weight of the evidence, it is the duty of the trial judge to weigh the evidence and determine whether it preponderates against the verdict, and if so, to grant a new trial. Overton v. Davis, 739 S.W.2d 2 (Tenn. Ct. App. 1987).

In James E. Strates Shows, Inc. v. Jakobik, 554 S.W.2d 613 (Tenn. 1977), the Tennessee Supreme Court defined the duty of the trial judge as thirteenth juror:

> In performing his duty as thirteenth juror, the trial judge is not bound to give any reasons for his action, any more than the jury is bound to do so. But, in

passing on a motion for a new trial, if it appears from the reasons assigned or statements made, that the trial judge was not satisfied with the verdict, it is the duty of the appellate courts to grant a new trial. Telephone and Telegraph Company v. Smithwick, 112 Tenn. 463, 79 S.W. 803 (1903).

554 S.W.2d at 615.

We find nothing in the record before us to indicate that the trial judge did not perform his duties as the thirteenth juror, nor does the record indicate that the trial judge was not satisfied with the verdict. therefore, it appears that the trial judge did properly perform his duty as the thirteenth juror. This issue is without merit.

Plaintiff's next issue for review is whether the trial court erred in allowing the introduction into evidence of prior medical records of plaintiff maintained by the Tennessee State Penitentiary Health Center.

Tennessee Rules of Evidence 803(6) provides:

> The following are not excluded by the hearsay rule:
>
> (6) Record of Regularly Conducted Activity. - A memorandum, report, record, or data compilation in any form of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit.

Primarily, defendant sought to introduce the records to impeach plaintiff's testimony that he had no prior back pain and arthritic problems. Plaintiff first argues that the custodian of the records who testified was unable to verify that the individuals who made the entries had the authority to make those entries.

"It is sufficient if the person laying

the foundation for the record testifies that the regular business procedure is for a person with personal knowledge of the recorded event to provide the information or make the entry." Neil P. Cohen et al., Tennessee Laws of Evidence, § 803(6).3 (2d ed. 1990). The record reflects that there was a proper foundation for the introduction of this evidence. Admissibility of evidence rests within the sound discretion of the trial court, and the decision for admission will be reversed only on the showing of abuse of that discretion. (Inman v. Aliminum Co. of America, 697 S.W.2d 350 (Tenn. Ct. App. 1985). Plaintiff testified that he had no prior back problems and arthritic problems and the evidence that could be considered contradictory was proper for the jury to consider. The trial court excluded the majority of the record and allowed only those records that indicate prior physical problems in contradiction to plaintiff's testimony. This issue is without merit.

The next issue for review is whether the

trial court erred in refusing to allow exhibits to be passed to the jury during the trial or closing argument. Plaintiff makes a general statement concerning the trial court's refusal to allow exhibits to be passed to the jury and does not point out in his brief any place in the record where such alleged error occurred. The court is not under any duty to minutely search as voluminous record to verify numerous, unsupported allegations in the brief. Schoen v. C. Bradford & Co., 642 S.W.2d 420 (Tenn. Ct. App. 1982).

Plaintiff's next issue is whether the trial court erred in allowing the defendant driver to testify. we have difficulty understanding plaintiff's argument in this issue. It appears that plaintiff argues that he was not allowed to call Nesbit as an adverse witness because Nesbit did not appear while he was putting on the proof. The record does not indicate that Nesbit was subpoenaed and failed to honor a subpoena issued by the plaintiff. As we previously noted, Nationwide joined issue on the plaintiff's complaint, and

the plaintiff apparently understood that, because he testified at length concerning how the accident occurred. plaintiff also makes some reference to being "cut off" during rebuttal testimony. he states in his brief, "Other than a few brief questions the court was not in the mood to allow the plaintiff to develop testimony concerning the new elements introduced by Mr. Nesbit." The brief does not point out any place in the record where the trial court cut off plaintiff's rebuttal testimony. We find this issue to be without merit.

Plaintiff's seventh issue for review, as stated in his brief, is:

> VII. The court erred in failing to grant a new trial based upon the unfair prejudice created by repeated blatantly improper questions and statements by the defense during the course of the trial designed to evoke bias, ill will and prejudice.

Plaintiff first asserts that the trial court erred in allowing into evidence the record of a psychological interview concerning the race of the boyfriend of plaintiff's

mother. Plaintiff contends that this was done to inject racial animosity into the case. The trial court considered plaintiff's objection and it appears that the evidence was admitted because of the relevancy of the family and social history with regard to psychiatric problems. The trial court weighed the probative value of the evidence and found that it outweighed any potential prejudicial effect. We do not find an abuse of discretion in this regard.

Plaintiff next argues that defense counsel asked improper questions, such as, had the plaintiff "ever played Russian Roulette." Defendant's counsel objected to this question, the trial court sustained the objection and that apparently was the end of the matter. Plaintiff also asserts that defense counsel asked plaintiff if he ever struck anyone, if he had a "fancy boat." Plaintiff's counsel made no objection concerning the first three of these alleged questions; therefore, any objection was waived. As to the last question concerning the "fancy boat," the record

reveals that it was plaintiff's counsel who asked this question on redirect examination. This issue is without merit.

Plaintiff's next issue presented for review is as follows:

> VIII. The court erred [in] not granting a new trial after defense counsel: (a) asked plaintiff about an unrelated lawsuit between the plaintiff and the state of Tennessee over three guards shooting him in prison while holding a white flag. (b) intentionally misquoting Dr. Hutt (an expert witness).

Here again, plaintiff has failed to point out any place in the record where this alleged error occurred, and we have difficulty determining that there was any type of error from the short statement made in plaintiff's brief. The issue is without merit.

The next issue presented for review, as stated in plaintiff's brief, is:

> IX. The court erred by not allowing adequate time for closing arguments after a three (3) week trial and by urging plaintiff's counsel from the outset to rush through the trial.

The trial court advised counsel that they

would be allowed thirty minutes each for closing argument. Plaintiff's counsel sought forty-five minutes and apparently was allowed a little additional time over the thirty minutes. We do not disagree with plaintiff's statement that a reasonable time should be allowed to counsel for closing argument. We have reviewed this record and, recognizing the wide discretion of the trial court in the conduct of a trial, we cannot find any abuse of discretion in limiting closing arguments. This was an automobile accident case and the parties were given an opportunity to fully and fairly present the evidence. There is nothing in the record to indicate that the trial court actually cut counsel off in his argument; if anything, he was allowed some leeway. We find no abuse of discretion on the part of the trial court. This issue is without merit.

Plaintiff's final issue, as stated in his brief, is:

> X. The court erred by not granting a new trial because of the inconsistent findings of the jury on the special verdict form and the admission by both parties and the

court that the jury was confused.

Nationwide amended its pleadings prior to trial to reflect the defense of comparative negligence subsequent to the ruling of the Tennessee Supreme Court in McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992). The interrogatories propounded to the jury were an effort to conform to the McIntyre decision.

It appears from the record that the jury first returned its special verdict form and answered that the defendant was negligent, but that his negligence was not the proximate cause of injury or damage to the plaintiff. Upon urging from the plaintiff, the jury was asked to continue deliberations to answer the third and forth questions o the special verdict form; that is: 3) Was the plaintiff negligent and 4) Did the plaintiff's own negligence account for more than fifty percent or more of the total negligence that proximately caused his/her injuries or damages. Upon further deliberation, the jury answered both of these questions in the affirmative. Plaintiff apparently argues that

the jury's answers to the four questions were inconsistent, but we don not find that to be the case. The jury merely found that the defendant did not proximately cause plaintiff's injuries and damages, and also found that plaintiff was responsible for more than fifty percent of the negligence that resulted in his problems. There does not appear to be any inconsistencies. We find this issue to be without merit.

In conclusion, the judgment of the trial court is affirmed and this case is remanded to the trial court for such further proceedings as may be necessary. Cost of the appeal are assessed against the appellant.

CRAWFORD, J.

CONCUR:

HIGHERS, J.

FARMER, J.

# APPENDIX C

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

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ALBERT W. WITTER, and wife

PHYLLIS WITTER

V.

ULYSES NESBIT

---

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

(2)

No. 94-157

In The

# Supreme Court of the United States

October Term, 1994

ALBERT WITTER, and WIFE,
PHYLLIS WITTER,

*Petitioners,*

vs.

ULYSES NESBIT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Tennessee, Western Section**

## BRIEF IN OPPOSITION FOR RESPONDENT NATIONWIDE MUTUAL INSURANCE COMPANY

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether or not Tenn. Code Ann. § 56-7-1206(a) violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, by providing uninsured motorist insurance companies the right to defend, as party defendants, against claims asserting reliance on the uninsured motorist coverages of their policies?

II. Whether or not Tenn. Code Ann. § 56-7-1206(a) violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, by providing uninsured motorist insurance companies the right to defend, as party defendants, against claims asserting reliance on the uninsured motorist coverages of their policies?

III. Whether or not the holding of the Court of Appeals of Tennessee, that it was erroneous under Tennessee law to allow a default judgment to be entered against an uninsured motorist that did not file any pleading when the uninsured motorist insurance company, acting pursuant to Tenn. Code Ann. § 56-7-1206(a), files an answer in its own name joining all issues of liability, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by depriving a party of a default judgment against an uninsured motorist?

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STATUTES CITED:

28 U.S.C. § 1257 (1988) . . . . . 2, 5

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No. 94-157

In The

# Supreme Court of the United States

October Term, 1994

ALBERT WITTER, and WIFE,
PHYLLIS WITTER,

*Petitioners,*

vs.

ULYSES NESBIT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Tennessee, Western Section**

## BRIEF IN OPPOSITION FOR RESPONDENT NATIONWIDE MUTUAL INSURANCE COMPANY

The Respondent, Nationwide Mutual Insurance Company[1], respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals of Tennessee, Western Section[2].

[1] Nationwide Mutual Insurance Company is a corporate entity with no parent company or subsidiaries.

[2] Petitioners erroneously seek a writ of certiorari to the Supreme Court of Tennessee. That court declined to exercise its jurisdiction over the case. Its order denying Petitioners' Application for Permission to Appeal is reprinted in Appendix C of the Petition for Certiorari. Thus, the petition for writ of

That opinion has not yet been published but is reprinted in Appendix B of the Petition for Certiorari.

## STATUTES INVOLVED

28 U.S.C. § 1257 (1988), provides in pertinent part as follows:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Tenn. Code Ann. § 56-7-1206(a) (1989), states as follows:

(a) Any insured intending to rely on the coverage required by this part shall, if any action is instituted

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certiorari should be addressed to the Court of Appeals of Tennessee, Western Section. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 n.1 (1954); *American Ry. Ex. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Sullivan v. Texas*, 207 U.S. 416 (1908).

against the owner and operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party Defendant. Such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner and operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice; provided further, that the evidence of service upon the insurance carrier shall not be made a part of the record.

## STATEMENT OF FACTS

This case arose out of an automobile accident which occurred in Memphis, Shelby County, Tennessee, on January 6, 1989. Albert Witter and his wife, the Petitioners, filed suit alleging negligence against the uninsured motorist, Ulyses Nesbit (hereinafter, "Nesbit"), also serving a summons and complaint on Nationwide Mutual Insurance Company (hereinafter "Nationwide"), pursuant to Tenn. Code Ann. § 56-7-1206, as the uninsured motorist insurance carrier for Albert Witter's employer. While Nesbit, filed no answer, Respondent, Nationwide, filed an answer in its own name contesting liability, as well as damages and other matters. Several months later, an order of default judgment was entered against Nesbit, which specifically stated that its effect was as to Nesbit only.

After extensive discovery and the handling of various procedural matters, a jury was impaneled and trial commenced on May 18, 1992. Following the proof, counsel presented closing arguments and the trial court charged the jury. The jury returned a verdict in favor of Nesbit and Respondent, Nationwide, on the issue of proximate causation. Moreover, pursuant to the Tennessee doctrine of modified comparative fault, the jury found that Petitioner, Albert Witter's own negligence was at least fifty percent of the total negligence resulting in his injuries and damages, thus barring the Petitioners' recovery.

The Petitioners moved for a new trial. Said motion was denied, and petitioners appealed this case to the Court of Appeals of Tennessee. Briefs were submitted, and the Court of Appeals of Tennessee, Western Section, heard oral argument. An opinion (Pet., Appendix B) and order were issued by the Court of Appeals affirming the judgment of the trial court and remanding the case for such further proceedings as may be necessary.

Following the opinion and order of the Court of Appeals. The Petitioners filed an application for permission to appeal to the Supreme Court of Tennessee. The application raised, for the first time, issues premised upon the Tennessee Constitution.[3] Permission to appeal to that court was denied. (Pet., Appendix C).

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[3] The Petitioners' application for permission to appeal to the Supreme Court of Tennessee raises "Constitutional" issues only under Article I, Section 8, and Article XI, Section 8 of the Constitution of Tennessee. (*See* Application for an Appeal by Permission to the Supreme Court [of Tennessee], p.9-10).

## SUMMARY OF THE RESPONDENT'S ARGUMENT

I. This Court lacks jurisdiction to grant certiorari, as no federal questions were raised or passed upon in the state court proceedings.

II. There are adequate state grounds barring this court's consideration of the federal questions raised for the first time in the Petition for a Writ of Certiorari.

III. There is no merit to the Petitioners' assertion that they have been unconstitutionally denied a property interest in a default judgment.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. This Court lacks jurisdiction to grant certiorari, as no federal questions were raised or passed upon in the state court proceedings.

Early in the history of this Court it was established that the Court would not decide federal constitutional issues raised for the first time upon its review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Based upon § 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, it was held that the Court was not vested with jurisdiction over certiorari appeals from the state courts unless a federal question was raised and decided below. *Illinois v. Gates*, 462 U.S. 213, 217-18 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438; *Crowell v. Randall*, 35 U.S. 285, 10 Pet. 368 (1836). The above rule has developed, however, to the point that it is now more accurately stated that a federal claim will not be considered by the Court unless it has been *"either* raised or

squarely considered and resolved in the state court." *Gates*, 462 U.S. at 218 n.1 (citing *McGoldrick v. Campaigne Generale Transatlantic*, 309 U.S. 430, 434-35 (1940); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945)).

There is some question as to whether the above rule is jurisdictional or merely prudential. *Gates*, 462 U.S. at 219. It is the position of this Respondent that the rule is jurisdictional, but even if it were only a rule of self-restraint imposed by the Court there are sound reasons for its continued application. As a practical matter, the record below is not generally adequate to address the new questions presented. *Cardinale*, 394 U.S. at 439. Such is clearly true of the present case. Further, in our system of federalism it is crucial that state courts be given the opportunity to address the constitutional attack of a state statute prior to a hearing by this tribunal, for statutes may often be construed in a manner which preserves their constitutionality, or the issue may be obviated altogether on an adequate state ground. *Cardinale*, 394 U.S. at 219. Additionally, the relationship between this Court and state courts demands that the state courts be given the opportunity to propose changes in existing remedies even where unconstitutionality is found to exist. *Gates*, 462 U.S. at 221-22.

In the instant matter, no federal constitutional issue was raised at any stage of the state court proceedings. Nor is there any indication that federal constitutional issues were ever considered by the courts below. Thus, the petition in this case should properly be denied for want of jurisdiction as the record below does not affirmatively show that any federal constitutional issue was

raised or passed upon below. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

**II. There are adequate state grounds barring this court's consideration of the federal questions raised for the first time in the Petition for a Writ of Certiorari.**

It is the rule of this Court that "when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

For purposes of this case, the "highest state court," is the Court of Appeals of Tennessee, Western Section, since the Supreme Court of Tennessee did not exercise its discretionary jurisdiction over the matter. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 n.2 (1954); *American Ry. Ex. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Sullivan v. Texas*, 207 U.S. 416 (1908).

It appears clear from the opinion of the Court of Appeals (Pet., Appendix B), that no federal questions were passed upon and, by Petitioners' own admission, no constitutional issues were presented to that court for review (Pet., p.9). Yet, even if this fatal flaw were overlooked, an adequate state ground exists for denying certiorari review as to the first two questions presented for review, as restated in this brief.

The Petitioners' arguments that Tenn. Code Ann. § 56-7-1206(a) violates the Equal Protection Clause of the Fourteenth Amendment, by placing injured drivers in the position of defending the same cause of action against duplicate defendants, and the Due Process Clause of the Fourteenth Amendment, by creating a conflict of interest between the uninsured motorist insurance company and the uninsured motorist, could have been raised in the trial court but were not. Failure to raise these constitutional issues in the trial court, creates an adequate state ground now barring this Court's review of those issues, for it is the general rule in Tennessee that constitutional attacks will not be entertained for the first time on appeal. *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). Thus, the Petitioners cannot overcome this Court's presumption that those issues were not properly presented below.

## III. There is no merit to the Petitioners' assertion that they have been unconstitutionally denied a property interest in a default judgment.

As to Petitioners' third argument, that they were denied a default judgment in violation of due process by the state appellate court's holding that the default judgment was erroneously granted; it is without merit. The appellate court's holding is, as plainly set forth in its opinion (Pet., Appendix B), based upon well settled principles of statutory construction. Thus, its holding in this regard is based upon adequate state grounds.

The Petitioners' assertion that they have been stripped of a property interest by the Court of Appeals is absurd. This Court has long held that a default judgment against one defendant, where there are other defendants sued jointly for the same cause of action that have answered the Complaint, is not a final decree as to the defaulting defendant. *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 554 (1872). Under such circumstances, this Court has found that a judgment against the plaintiff on the merits, should properly lead to a dismissal of all defendants, including the defendant in default. *Id.* To treat the defendants differently under such a set of facts, would be "incongruous and illegal." *Id.* Thus, the Petitioners are erroneous in their assumption that the default judgment entered by the trial court was a final decree creating a property interest and this due process argument must necessarily fail.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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